FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1732

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1985

C.A. No. 85-1755
D.C. No. CV F-83-501

MITSUE TAKAHASHI, *Petitioner*

vs

BOARD OF TRUSTEES OF THE LIVINGSTON UNION SCHOOL DISTRICT; FRED KISHI, DENNIS STEFENSEN, JANET MARTIN, CHARLA SOTO AND ROBERT WEIMER, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT, *Respondents.*

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE SUPREME COURT

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October Term, 1985

C.A. No. 85-1755
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MITSUE TAKAHASHI, Petitioner

vs.

BOARD OF TRUSTEES OF THE LIVINGSTON UNION SCHOOL DISTRICT; FRED KISHI, DENNIS STEFENSEN, JANET MARTIN, CHARLA SOTO, and ROBERT WEIMER, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully pray that the writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit entered in the above-entitled action on February 21, 1986 be

denied.

OPINIONS BELOW

On February 5, 1985, the United States District Court for the Eastern District of California entered its Judgment granting Defendants' motion for summary judgment dismissing Petitioner's complaint herein on the grounds that the judgment entered in the Superior Court of the State of California for the County of Merced, entitled California Teachers Association; Mitsue Takahashi v. Governing Board of the Livingston Union School District, Case No. 6527, on July 9, 1981 was res judicata as to the issues, claims and causes of action alleged by Plaintiff in this action. The Memorandum and Order re Defendants' Motion for Dismissal or Summary Judgment and the Judgment of the District Court is attached hereto as Respondents' Appendix A, pages 1 to 16.

On February 21, 1986, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's judgment. The Opinion of the Court of Appeals is included in Appendix A, infra, beginning on page 19.

JURISDICTION

Jurisdiction of the Court has been invoked by Petitioner under 28 U.S.C. Section 1254(1) on the grounds that there currently exists a conflict between the decision of the Court of Appeals in this case and the decisions of other courts of appeals regarding a substantial and important federal question. However, Respondents contend that no such conflict exists and that this case in reality involves solely a question of state law.

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, Section 1
2. 42 U.S.C. §§1981 and 1983
3. 28 U.S.C. §1738
4. California Education Code §§44944 and 44945
5. California Government Code §11523

The full text of these constitutional and statutory provisions is set out in Appendix B, infra.

QUESTION PRESENTED

Whether a state court judgment upholding the decision of an administrative hearing body to dismiss a teacher bars a federal court action challenging the dismisssal on constitutional grounds which could have been raised in the prior state court proceeding.

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. §§1981 and 1983. Petitioner Mitsue Takahashi (Takahashi) alleges that the Livingston Union School District (District) wrongfully terminated her employment as a teacher because of her sex and ethnic origin. (CR[1] 1) She also alleges that her termination violated her rights to equal protection of the law under §§1981 and 1983. (CR 1)

Takahashi previously litigated the propriety of her dismissal in the courts of this state after first exhausting her administrative remedy under California Education Code §§44932, et seq. This litigation was pursued all the way to the United States Supreme Court, with Takahashi's dismissal being upheld at each level. It is District's contention that this prior state litigation and its

outcome bars Takahashi's claims in this action on the grounds of res judicata. Accordingly, we will summarize the course of the state proceedings.

On May 12, 1980, pursuant to California Education Code §44932(d), the District's Board of Trustees gave notice to Takahashi of its intent to dismiss her from her position as a permanent teacher because of incompetency. (CR 11, Ex.B)

Takahashi requested a hearing pursuant to California Education Code §44943, and a hearing was held before the Commission on Professional Competence. (CR 11, Ex.C)

Pursuant to California Education Code §44944, the Commission consisted of one administrative law judge from the State Office of Administrative Hearings, and two appointees who were credentialed to teach and who had served at least five of

the previous ten years teaching in the same discipline as Takahashi, neither of whom were employees of the District. (CR 11, Ex.C)

On November 6, 1980, the Commission on Professional Competence of the Livingston Union School District issued findings of fact and conclusions that Takahashi was incompetent to teach and guilty of two instances of false testimony before the Commission and ordered her dismissed from her teaching position. (CR 11, Ex.C)

Takahashi sought review of her dismissal in the Superior Court of the State of California for the County of Merced on the grounds, among others, that her dismissal violated due process of law. (CR 11, Ex.C) Applying the independent review test mandated by California Education Code §44945, the Superior Court concurred with the findings of fact and con-

clusions of the Commission on Professional Competence and found Takahashi incompetent to teach and guilty of unclean hands for false testimony at the administrative hearing. (CR 11, Ex.B) The court entered judgment against Takahashi. (CR 11, Ex.A)

Takahashi appealed the Superior Court judgment to the Court of Appeal of the State of California in and for the Fifth Appellate District. On June 20, 1983, the Court of Appeal affirmed the lower court judgment. (California Teachers Assn. v. Governing Board (1983) 144 Cal.App.3d 27, 192 Cal.Rptr. 358.) (CR 11, Ex.C)

On July 14, 1983, the appellate court issued an order denying Takahashi's petition for rehearing and modifying the opinion. (California Teachers Assn. v. Governing Board (1983) 145 Cal.App.3d

451A.) On August 17, 1983, the California Supreme Court denied Takahashi's request for hearing, R. Bird, C.J. dissenting.

On November 14, 1983, Takahashi sought a writ of certiorari from the Supreme Court of the United States to review the decision of the California Court of Appeal on the grounds that her dismissal violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. On January 23, 1984, the Supreme Court denied the petition for a writ of certiorari. Takahashi v. Governing Board (1984) 465 U.S. 1008, 104 S.Ct. 1003, 79 L.Ed.2d. 235.

On November 10, 1983, Takahashi filed the current action. (CR 1) At the direction of the District Court, the District brought a motion to dismiss the

complaint or for summary judgment. (CR 9) On January 3, 1985, the District Court granted District's motion for summary judgment on the grounds that the current action is barred on the grounds of res judicata. (Appendix A, pages 1 to 16.)

ARGUMENT AGAINST GRANTING THE WRIT

I

THE COURT OF APPEALS' OPINION IN THE CASE AT BAR DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS

A. The Decision of the Ninth Circuit Court of Appeal.

In holding that this action is barred by res judicata, both the District Court and Ninth Circuit Court of Appeal viewed this case as being controlled by the United States Supreme Court's decisions in Allen v. McCurry (1980) 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 and Migra v. Warren City School District Board of

Education (1984) 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56. Both Allen and Migra involved attempts by plaintiffs to bring an action under 42 U.S.C. §1983 in federal court to redress an alleged wrong which had already been the subject of state court litigation. In Allen, the plaintiff had been a defendant in a state court criminal proceeding who had unsuccessfully challenged the constitutionality of the search of his house in attempting to suppress evidence. In Migra, the plaintiff, like Takahashi here, was a school district employee who initially filed an action in state court challenging her dismissal before proceeding to federal court under §§1981 and 1983, claims she admittedly had not raised in the state action. In both cases, the Supreme Court held that state law would govern in determining the pre-

clusive effect of the state court judgment on plaintiff's federal claim. Citing 28 U.S.C. §1738, the Court stated:

> It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered. (79 L.Ed.2d at p. 61)

The Ninth Circuit noted that Takahashi had previously litigated her dismissal unsuccessfully in California state court. Therefore, in accordance with Allen and Migra, the Court of Appeal looked to California law to determine whether the prior state court judgment would bar Takahashi's civil rights claims. The Court of Appeal ruled that California courts would apply res judicata in this instance. The Court was careful to note that here, as in Allen and Migra, a prior state court judgment was involved and it was this judgment and not the decision of

the administrative panel that first upheld Takahashi's dismissal which barred the present action. (Appendix A, page 35.) The Court of Appeal found that Takahashi could have presented her constitutional claims before the state court and, having failed to do so, she was precluded from raising them in a subsequent action.

B. Bottini v. Sadore Management Corp.

Takahashi argues that the Court of Appeals decision in this case directly conflicts with the decision of the Second Circuit in Bottini v. Sadore Management Corp. (2nd Cir. 1985) 764 F.2d 116. This contention is clearly without merit.

Bottini involved a Title VII action. The plaintiff (Bottini) there was employed as a building superintendent by defendant Sadore Management Corporation (Sadore). When Sadore dismissed plain-

tiff, Bottini demanded that the matter be submitted to arbitration as provided in the union contract which governed his employment. The arbitrator upheld Bottini's dismissal but apparently did not consider Bottini's discrimination claims. Bottini appealed the arbitrator's decision in state court and his appeal was denied. He also filed a complaint with the New York State Division on Human Rights (SDHR). The SDHR, after an administrative investigation of the complaint, found no probable cause to believe Bottini was discharged because of his religious beliefs. Bottini did not appeal this decision to state court, but instead filed suit under Title VII.

The Second Circuit ruled that Bottini's Title VII action was not barred by res judicata. The Court noted that the United States Supreme Court had pre-

viously held that arbitration awards would not bar subsequent Title VII proceedings in federal court in Alexander v. Gardner-Denver Co. (1974) 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147. The Court held that the state court's confirmation of the arbitration award did not preclude a subsequent Title VII action since the state court's authority to review the award did not allow it to examine the merits of the underlying controversy or consider plaintiff's Title VII claims. Similarly, the Court held that the SDHR's determination had no preclusive effect, since it was only the decision of a "state administrative agency, and not the state court,. . .." (664 F.2d at p. 121.)

The case at bar is easily distinguishable from Bottini. First, it does not involve an arbitration award but rather

an administrative proceeding before a panel chaired by a state administrative law judge. In this proceeding, Takahashi was free to raise constitutional issues and the panel was required to rule on them. (Bekiaris v. Board of Education [1972] 6 Cal.3d 575, 100 Cal.Rptr. 16; California Government Code §11506(a)(5).) Thus, Takahashi's rights were not limited to those accorded her in a collective bargaining agreement or the law of the shop, which was the case in Bottini. Second, Takahashi was entitled to and did receive a de novo review of the administrative panel's decision in state court. As the Ninth Circuit noted in its opinion:

> [T]here is no doubt that the [state] trial court had jurisdiction to hear [Takahashi's constitutional] claims under California Education Code §44945. In addition, the trial court was fully competent to decide the merits of any claims

> raised before it. Thus, Takahashi was afforded an opportunity to make a full presentation of her constitutional claims.

Third, Takahashi did, in fact, appeal the administrative decision to state court and received an adverse judgment. Thus, the provisions of 28 U.S.C. §1738 govern and the District Court was required to give the state court's judgment the same claim preclusive effect it would have received in state court. Fourth, Bottini involved a Title VII claim, which can only be brought in federal court. The Second Circuit identified significant public policy arguments for not applying claim preclusion rules in such cases, at least where the state proceeding only involved an arbitration. In contrast, Takahashi brings this action under 42 U.S.C. §§1981 and 1983, the same statutes sued under in Migra. Accordingly, the

District Court and Court of Appeal were correct in applying Migra and looking to California law to determine the claim preclusive effect of the state court judgment.

A recent Second Circuit case which is on point is Genova v. Town of Southampton (2nd Cir. 1985) 776 F.2d 1560. The plaintiff in that case had been discharged by the Town from his job as a police officer. He was given an administrative hearing and, after the Town Board approved the dismissal, he unsuccessfully appealed the action to the New York state court in an Article 78 review proceeding. He then, like Takahashi, sought relief in federal court under 42 U.S.C. §1983. The Second Circuit ruled that Migra applied and that New York law would bar the subsequent §1983 proceeding.

Clearly Genova is more similar to the

case at bar than Bottini, in that it dealt with an administrative proceeding upheld by a subsequent state court judgment, the same sequence of proceedings as exist here. Accordingly, it shows that the Second Circuit would make the same ruling in this case as the Ninth Circuit. Decisions from other Circuits indicate that they also are in accord with the Ninth Circuit holding in this case; see, for example, Krison v. Nehls (7th Cir. 1985) 767 F.2d 344 and Stall v. Bourne (4th Cir. 1985) 774 F.2d 657.

C. Other Cases Cited by Petitioner.

Takahashi cites several other cases to support her claim that a conflict exists between the circuits on this issue. Like Bottini, each of these cases is clearly distinguishable from the case at bar.

McDonald v. City of West Branch (1984) ____ U.S. ____ , 80 L.Ed.2d 302, 104 S.

Ct. 1977, like Bottini, dealt with the question of the claim preclusive effect of an arbitration award. In McDonald, the award was not appealed and the plaintiff brought a §1983 action in federal court. The Supreme Court held that the arbitration award did not bar the subsequent §1983 action because "[a]rbitration awards are not . . . subject to the mandate of §1738" since they are not "judicial proceedings" of a state court. (80 L.Ed.2d at p. 307, quoting Kremer v. Chemical Construction Co. [1982] 456 U.S. 461, 466, 72 L.Ed.2d 262, 102 S.Ct. 1883.) However, the Supreme Court made it clear that Migra and 28 U.S.C. §1738 would control if, as in the instant case, a state court judgment was involved. (80 L.Ed.2d at p. 306-307.)

The Court in McDonald also listed four reasons why an adverse arbitration award

should not bar a subsequent §1983 proceeding. They were: 1) that an arbitrator's expertise pertains primarily to the law of the shop rather than the law of the land, making him less competent to resolve issues of federal law such as §1983 actions; 2) that the arbitrator's jurisdiction is generally limited by the collective bargaining agreement, which may prevent him from enforcing §1983; 3) that the union, and not the employee, usually has exclusive control of the handling of a grievance, which might result in constitutional claims not being raised or being presented less vigorously than the employee might wish; and 4) that the rules of evidence and procedure are different in arbitration proceedings. None of these four arguments apply to the case at bar. First, while it is true that Takahashi's administrative panel contain-

ed two educators, the third member was an administrative law judge skilled in dealing with constitutional and civil rights issues. (Bekiaris v. Board of Education, supra.) Second, Takahashi appealed the Commission's decision to state court, which was clearly experienced in deciding constitutional claims and possessed the necessary jurisdiction to do so. (California Education Code §44945; see also California Government Code §11506(a)(5).) Third, contrary to Petitioner's claims, Takahashi was the moving party and legally in control of her state court action from the outset. She did not require her union's approval or cooperation before initiating her appeal or litigating it at any stage of the state court proceeding. (California Education Code §§44944, 44945, California Teachers Assn. v. Governing Board [1983] 144 Cal.App.3d 27,

192 Cal.Rptr. 358.) Fourth, although Takahashi's administrative hearing was governed by somewhat relaxed rules of evidence, it was identical to a state court trial proceeding in virtually all other respects. (California Education Code §44949; California Government Code §11500 et seq.) Moreover, Takahashi received a de novo review of her administrative hearing in state court, giving her the additional procedural protections at that level.

Whitfield v. City of Knoxville (6th Cir. 1985) 756 F.2d 455 is also not in conflict with the Ninth Circuit's holding in this case. The Court in Whitfield acknowledged that Migra required that it give full faith and credit to a prior Tennessee state court judgment in ruling on plaintiff's ADEA claim if plaintiff could have raised the ADEA claim in the

state proceeding. However, in Whitfield the Sixth Circuit ruled that the state suit had concluded before the 60 day waiting period for filing suit on the ADEA claim had elapsed. Accordingly, the Sixth Circuit held that the state judgment would not be res judicata as to the ADEA claim under Tennessee law because the state court could not have ruled on the claim at the time it entered its judgment.

Takahashi also cites Elliot v. University of Tennessee (6th Cir. 1985) 766 F. 2d 982, cert. granted 88 L.Ed.2d 455 (Dec. 3, 1985) and Goldsmith v. Dupont Co., (D.Del. 1983) 32 F.E.P. Cases 1879. Elliot, since certiorari has been granted, is not binding precedent. However, it is interesting to note that the Sixth Circuit acknowledged in that case that if the decision of the administra-

tive law judge had been reviewed by the state court, 28 U.S.C. §1738 would control and it would follow state law in determining whether res judicata applied. Moreover, the administrative law judge in Elliot determined that he did not have jurisdiction to rule on the appellant's constitutional claims, which, as noted above, is not the case under California law in teacher dismissal hearings. Goldsmith also appears to deal with an unreviewed state administrative determination. It is also only a federal district court decision and, therefore, cannot constitute a conflict with the decision of a circuit court.

Once one reads the cases cited by Petitioner, it is clear that no conflict exists between the Ninth Circuit's decision in this case and the decisions of other circuit courts. Petitioner by

leaving out significant facts in describing each case, attempts to fit square pegs into round holes. It is a futile effort. The circumstances of this case are virtually identical to those of Allen and Migra. As in those cases, the District Court and Ninth Circuit here were required to rule on the effect of a prior state court decision on the present action. Following the holding in those cases, they correctly applied California law in resolving this issue. This being the case, the decision can hardly be in conflict with those of other circuits, who would seldom have occasion to rule on an issue involving the law of this state.

II

THE NINTH CIRCUIT'S DECISION CORRECTLY APPLIES CALIFORNIA LAW OF RES JUDICATA.

California courts employ the "primary

right theory" in determining whether res judicata applies. (Slater v. Blackwood [1976] 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 226, 543 P.2d 593, 594.) The Ninth Circuit's opinion notes that Takahashi's prior state court action was based on the invasion of her right to employment with the District and that the case at bar sought compensation for violation of the same primary right. The Court reasoned:

> In determining the primary right at stake, "the significant factor is the harm suffered." Argarwal v. Johnson, 25 Cal.3d 932, 955, 160 Cal.Rptr. 141, 155, 603 P.2d 58, 72 (1979). Absent termination of her employment contract, Takahashi suffered no harm.

The Ninth Circuit held that Takahashi's invoking the Constitution and 42 U.S.C. §1983 did not change the basic nature of her action. She merely was seeking recovery for the same alleged inquiry based on a different legal theory. This

was not enough to avoid the bar of res judicata under California law.

The above discussion highlights the inappropriateness of the Supreme Court hearing this matter. Takahashi is, in effect, requesting the Court to decide a question of California law. Given the already heavy demands on this Court's time, this is not the type of case which deserves the Court's attention. Takahashi appealed her prior state court action all the way to the Supreme Court and lost at every level. She has had her day in court and should not be granted another.

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III

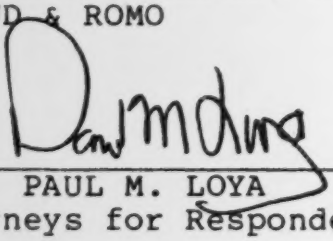
CONCLUSION

Based on the foregoing, Respondents request that the Petition for Certiorari be denied.

Dated: May 30, 1986

Respectfully submitted,

ATKINSON, ANDELSON, LOYA,
RUUD & ROMO

By 
PAUL M. LOYA
Attorneys for Respondents

A P P E N D I X A

DECIDED
JANUARY 3, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MITSUE TAKAHASHI, Plaintiff, v. BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT, et al., Defendant.	)	CV F 83-501-EDP MEMORANDUM AND ORDER RE DEFENDANTS' MOTION FOR DISMISSAL OR SUMMARY JUDGMENT

At the direction of the Court at the First Status Conference in this matter, the defendants filed a motion to dismiss the complaint or for summary judgment on the grounds that the judgment entered in the Superior Court of the State of California for the County of Merced, entitled California Teachers Association; Mitsue Takahashi v. Governing Board of the Livingston Union School

District, Case No. 6527, on July 9, 1981, is res judicata as to the issues, claims and causes of action now alleged by the plaintiff in this Court. Defendants further rely on the fact that the Merced Superior Court judgment was affirmed in 144 Cal.App.3d 27 (5th DCA, 1983) as modified in 145 Cal.App.3d 451A (5th DCA, 1983). The defendants further point out that the California Supreme Court denied hearing on the matter on August 17, 1983, and the United States Supreme Court declined to grant the plaintiff's requested writ of certiorari in 104 S.Ct. 1007 (1984).

The principal thrust of plaintiff's argument is found in plaintiff's supplemental brief which was filed at the direction of the Court: "The 'primary right' which Takahashi's federal suit seeks to vindicate is the right to have

same basis, and with the same standards, as those utilized for the teachers in her school not of Japanese descent, and in conformity with the equal protection clause of the 14th amendment. That primary right was neither litigated nor determined in California Teachers Association v. Governing Board, supra."

Although the defendants moved on alternate grounds, they buttressed their motions with affidavits and declarations which were not answered by the plaintiff by counter-declarations or affidavits. The Court rules on the motion as a motion for summary judgment rather than a Rule 12(b)(6) motion.

We start with the findings of fact and conclusions of law which form the basis of the Superior Court judgment:

> 3. Two separate notices of incompetency were personally served on petitioner on

April 24, 1979 and January 8, 1980, respectively. Each of the notices specified the nature of the incompetency and gave specific instances of behavior with such particularity as to furnish to petitioner an opportunity to correct her fault and to overcome the grounds for the charge of incompetency. Each of the notices included an evaluation made pursuant to Article 11, commencing with Section 44660, of Chapter 3 of Part 25 of the Education Code.

8. On January 9, 1978, in petitioner's classroom between 1:00 and 1:45 p.m., petitioner failed to exercise classroom and student control as alleged in paragraph 1 of the statement of charges.

9. On October 16, 1978, at 2:45 p.m., students were playing soccer inside petitioner's classroom, screaming loudly, and running in and out of the room. This activity continued for approximately ten minutes.

10. On November 3, 1978, at 1:05 p.m., students were yelling in class and were disturbing office personnel by yelling over the intercom.

11. On November 17, 1978, at 10:00 a.m., students were ob-

served standing at the backdoor of petitioner's classroom yelling to students on the playground.

12. On May 16, 1979, from 1:00 to 1:15 p.m., in and near petitioner's classroom, three boys were wrestling and yelling outside the backdoor. Students were wandering around the room, visiting and yelling. One boy threw a pencil across the room to a friend, telling him to sharpen it for him. One girl was reading a magazine and told petitioner "she didn't feel like doing work that day." She continued to read the magazine. One girl sat outside for the duration of the period, stating simply that she did not want to go to class.

13. On June 8, 1979, Joe Holt, a maintenance man, overheard vulgar language by various students in petitioner's class and in her presence. These conversations were lengthy and loud enough for Holt to hear while working under the sink, and caused Holt to stand up to see if petitioner was still in the room.

14. On September 26, 1979, in petitioner's classroom, several conversations not related to the lesson were going

on between students while she tried to conduct the lesson. She often asked questions and immediately answered them herself, thus not giving students a chance to answer. The petitioner failed to realize which issues students had strong feelings about, and thus missed great opportunities for discussion. Class time and material were used with no demonstrated objective learning or evaluation.

15. On October 24, 1979, petitioner's class was observed from 10:45 to 11:17 a.m. There was no planning of lessons, and no learning objective or focus for the lesson. Her plan book showed few lessons actually planned in advance and clearly determining the objective.

16. On October 23, 1979, a student was transferred to another room so she could resume learning. This student was unable to work effectively in petitioner's classroom because of noise and confusion in the class.

17. On November 14, 1979, a girl student was screaming at petitioner, "you don't have to poke me, just tell me to shut up." Petitioner apologized but otherwise ignored the screams, and turned to the film-

strip projector to start the lesson. The screaming continued for some time until the student saw the principal in the doorway.

18. On November 27, 1979, petitioner's class was in a disorganized and uncontrolled state. Some groups of students were working, others were talking, three boys were wrestling over a roll of masking tape and told to stop. Petitioner did not respond to the noise or movement but walked around talking to individual students. According to the lesson plans, the class should have been involved in a whole group activity.

20. On March 20, 1980, from 9:45 to 10:04 a.m., petitioner's eighth grade diagrammed sentences and later changed to math. Students shouted out answers or requests for help even though petitioner asked them to raise their hands. To get students' attention, she shouted over their voices, but this made little difference in the students' attention.

21. On April 15, 1980, questions posed by petitioner on square roots were formulated in such an unclear manner that they prompted loud and confusing total group responses. Petitioner did not manage the

classroom environment adequately to provide for effective teaching and active learning. Students were allowed to behave in a disorderly manner (loud talking, laughter, jokes, mimicking) without any consequences or demands from petitioner that they stop this behavior.

22. On April 22, 1980, a parent requested that her child be transferred from petitioner's class, on the grounds that there was no discipline in her classroom, nobody understood the assignments she gave, and the students who want to study are unable to do so because of the disorder.

23. On May 8, 1978, and on numerous subsequent occasions, petitioner was informed of the need to correct her lack of control over the students and of concern with her relations with students and parents.

24. Petitioner's testimony that the events described in paragraph 18 occurred during a break between classes, and that the observation described in paragraph 21 was altered after it had been shown to her was false and not entitled to credit.

25. Throughout the time periods in issue here, peti-

> tioner was given the opportunity to respond in writing to the various charges against her, but never did so respond within the alloted time periods.

The California legislature mandates the evaluation and assessment of performance of certificated employees. See Article 11, Chapter 3, Part 25, California Education Code §§44660, et seq.

Section 44660 declares it to be the intent of the legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel in each school district of the state.

Section 44661 mandates the governing board to avail itself of the advice of the certificated instructional personnel in the development and adoption of the guidelines and procedures pursuant to this article.

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Section 44662 enumerates the evaluation assessment guidelines which each district must follow:

> (a) The governing board of each school district shall establish standards of expected pupil achievement at each grade level in each area of study.
>
> (b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to:
>
> (1) The progress of pupils toward the standards established pursuant to subdivision (a).
>
> (2) The instructional techniques and strategies used by the employee.
>
> (3) The employee's adherence to curricular objectives.
>
> (4) The establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.
>
> (c) The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory

and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of such noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.

(d) The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized tests.

(e) Nothing in this section shall be construed as in any way limiting the authority of school district governing boards to develop and adopt additional evaluation and assessment guidelines or criteria.

Section 44663 entitles the person being assessed to initiate a written response to the evaluation which shall become a permanent attachment to the employee's personnel file. A personal meeting is required with each certificated teacher and the evaluator in order to discuss the evaluation. This meeting

must be held before the last school day of the school year.

Section 44664 requires evaluation of each certificated employee to be made at least once a year for probationary personnel and at least every other year for personnel with permanent status. This section further provides that if any evaluation contains an unsatisfactory rating, the certificated employee shall, as determined necessary by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance, and to further pupil achievement and the educational objectives of the employing authority.

Clearly, the trial court's finding that the evaluation procedures met the legislative standards included a necessary finding that the evaluation proce-

dure met due process requirements.

A careful reading of the California appellate court's decision, however, indicates that the defendant governing board had not, in fact, established an evaluation procedure pursuant to the legislative mandate. Indeed, at the outset of the California appellate court decision, the principal issue is stated as follows:

> The principal issue on appeal is whether the district's failure to adopt uniform objective guidelines for evaluation and assessment of the classroom management performance of all its certificated personnel, pursuant to Education Code section 44660 et seq. (the Stull Act) precludes it from giving to the affected employee a valid 90-day written notice of charges of incompetency as required by section 44938.

California Teachers Assn. v. Governing Board, 144 Cal.App.3d 27, 30, ____ Cal. Rptr. ____ (1983).

Finally, the appellate court upheld the trial court's independent judgment of the evidence presented at the administrative hearing.

The Court is mindful of the recent decision of the Ninth Circuit in Jordan v. City of Lake Oswego, 734 F.2d 1374 (9th Cir. 1984). In that case, the panel observed that:

> The City urges res judicata as an alternate ground for affirmance. It argues that Jordan's section 1983 action should have been joined with his two prior state court actions challenging his dismissal. Migra v. Warren City School District, ____ U.S. ____, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), lends powerful support to the City's contention. There is serious question, however, whether either of these state actions was decided on the merits. There is also some question whether the conflicting positions taken by the state courts in Jordan's two actions resulted in Jordan's not being provided a full and fair opportunity to litigate his federal claim. See id., at ____, 104 S.Ct. at 896 (quoting Allen v.

McCurry, 449 U.S. 90, 97-99, 101 S.Ct. 411, 416-417, 66 L.Ed. 2d 308 (1980)).

Jordan v. City of Lake Oswego, supra, at 1377.

In the instant case it is clear to the Court that the plaintiff's case was decided on the merits in state court, and that further, the issue raised here was necessarily considered by the state courts at each level and decided adversely to the plaintiff. To state it differently, the nexus of operative facts were fully explored in the State Court proceedings. The State Courts were free to raise any constitutional issue encompassed by the evidence.

Accordingly, the defendants' motion for summary judgment is granted. Counsel for the defendants is directed to lodge an appropriate final judgment with the Court within twenty (20) working days

from the date of this order.

DATED: January 3, 1985.

EDWARD DEAN PRICE

United States District Court Judge

DECIDED
FEBRUARY 5, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MITSUE TAKAHASHI,	)	
	)	
Plaintiff,	)	CV F 83-501-EDP
	)	
v.	)	JUDGMENT
	)	
BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT; FRED KISHI, DENNIS STEFFENSEN, JANET MARTIN, CHARLA SOTO, and ROBERT WEIMER, in their official capacities as members of the BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT,	)	
	)	
Defendants.	)	

Defendants having moved for dismissal or for summary judgment dismissing the complaint and the motion having come before the Honorable Edward Dean Price, United States District Judge, and the Court thereafter on July 9, 1984, and the Court having handed down its opinion

granting the defendants' motion for summary judgment dismissing the complaint, it is,

ORDERED, ADJUDGED, AND DECREED:

That the complaint be and it is hereby dismissed.

Dated: 2-5-85

EDWARD DEAN PRICE

United States District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MITSUE TAKAHASHI,	)	
	)	
Plaintiff-Appellant,	)	C.A. No.
	)	85-1755
vs.	)	
	)	D.C. No.
BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT, FRED KISHI, DENNIS STEFFENSEN, JANET MARTIN, CHARLA SOTA, and ROBERT WEIMER, in their official capacities as members of the BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT,	)	CV F-83-501
	)	OPINION
Defendants-Appellees.	)	

On Appeal From the United States
District Court For the Eastern
District of California
Hon. Edward Dean Price, District Judge,
Presiding
Argued and Submitted November 13, 1985 -
San Francisco, California

Before: GOODWIN, NELSON and CANBY,
Circuit Judges.

CANBY, Circuit Judge:

Mitsue Takahashi appeals the district court's dismissal of her action on the

ground of res judicata. The district court held that Takahashi's action, brought under 42 U.S.C. §§1981 and 1983 against the Board of Trustees of Livingston Union School District and individually named defendants (collectively "the District"), was barred by a prior unsuccessful litigation brought by Takahashi against the District in a California state court. We affirm.

FACTS

From August 1960 to November 1980, Mitsue Takahashi, a female United States citizen of Japanese ancestry, was employed as a high school teacher by the Livingston Union School District.

On June 26, 1980, Takahashi received a notice of accusation filed by the superintendent of the District alleging that cause existed for her dismissal because of her failure to maintain a suitable

learning environment in her junior high school classroom. Takahashi requested a hearing on this charge before the Commission on Professional Competence. On November 6, 1980, the Commission issued its two-to-one decision concluding that Takahashi was incompetent to teach and ordering her dismissal.

Takahashi commenced a proceeding in mandamus in the Superior Court of the State of California for the County of Merced to compel the Commission to set aside its decision. After receiving an adverse judgment, Takahashi appealed to the Court of Appeal for the Fifth Appellate District. The Court of Appeal found that (1) Takahashi had no right to reinstatement based on the District's failure to evaluate her performance pursuant to the Stull Act, California Education Code §44660 et seq. and (2) substantial evi-

dence supported the trial court's finding that cause existed for Takahashi's dismissal. California Teachers Ass'n. v. Governing Board, 144 Cal.App.3d 27, 192 Cal. Rptr. 358 (1983). Takahashi's subsequent petitions to the California Supreme Court for review and to the Supreme Court of the United States for a writ of certiorari were denied.

On November 10, 1983, having exhausted the channels for direct judicial review of her dismissal, Takahashi filed the present action in the United States District Court for the Eastern District of California. Takahashi's complaint alleged that the District violated her rights under the fourteenth amendment to the United States Constitution and 42 U.S.C. §§1981 and 1983 by (1) terminating her employment on account of her sex and ethnic origin, (2) terminating her em-

ployment on the basis of the impermissibly vague requirement that she maintain a suitable learning environment in her classroom, and (3) employing methods of evaluating her job performance that were different from those employed to evaluate the performance of others similarly situated. Takahashi requested compensatory damages for lost wages and mental distress as well as punitive damages.

The District answered Takahashi's complaint by pleading inter alia the defense of res judicata. At the direction of the district court, the District moved for a judgment on the pleadings under Fed. R. Civ. P. 12(c) or summary judgment under rule 56(c). On January 3, 1985, the district court granted the District's motion for summary judgment and dismissed Takahashi's complaint on the ground that her action was barred by res judicata.

ANALYSIS

I. The District's Failure to Submit into Evidence the Record of the Prior Adjudication

Takahashi initially contends that the district court erred in holding that her claims were barred by res judicata because the District had failed to submit into evidence the record established by the state trial court. We reject this contention.

In support of her position that the submission of the record of the prior adjudication is a condition precedent to a finding of res judicata, Takahashi cites Guam Investment Co. v. Central Building, Inc., 288 F.2d 19 (9th Cir. 1961). In Guam Investment, we stated,

> It appears to us that before an action may be summarily dismissed on the ground of res judicata the ends of justice require as a minimum that the defense of res judicata appear from the face of the complaint

> or that the record of the prior case be received in evidence.

Id. at 24. Takahashi erroneously construes this language as imposing a strict pleading or evidentiary requirement for the assertion of the res judicata defense.

In Guam Investment, we were faced with "uncontroverted allegations" about "matters which occurred subsequent to the judgment . . . in the prior case," id., and were concerned that such allegations not be disposed of upon a bald pleading of res judicata, id. at 23. In the present case, there are no such outstanding factual allegations and the District has submitted sufficient evidence to allow the evaluation of its res judicata defense. When the moving party has "introduce[d] a record sufficient to reveal the controlling facts and pinpoint

the exact issues litigated in the prior action," there is no need for the entire record of the prior litigation to be submitted into evidence. Hernandez v. City of Los Angeles, 624 F.2d 935, 937 (9th Cir. 1980). See also Jones v. Gann, 703 F.2d 513, 515 (11th Cir. 1983)(res judicata defense may be raised "by introducing sufficient information into the record to allow the court to judge the validity of . . . the defense"). As will be shown, in the present case we are able to evaluate the merits of the District's res judicata defense from the evidence on hand.

II. Preclusion of Section 1983 Claims by State Court Judgments

Takahashi next contends that her claims brought under section 1983 may not be barred by a prior unsuccessful litigation in California state court. In

Allen v. McCurry, 449 U.S. 90 (1980), the Supreme Court considered whether a §1983 claim brought in federal court was subject to collateral estoppel by a prior state court judgment where the state court had provided the federal plaintiff a full and fair opportunity to litigate his federal claims. The Court rejected the argument that Congress in enacting 42 U.S.C. §1983 "intended to repeal or restrict the traditional doctrines of preclusion." Id. at 98. In Migra v. Warren City School District Board of Education, 104 S.Ct. 892, 897-98 (1984), the Court explicitly extended the rule of Allen v. McCurry to cover claim preclusion, the aspect of res judicata asserted by the District, as well as collateral estoppel.

Takahashi seeks to distinguish Migra on the grounds that the plaintiff in

Migra, unlike herself, could have proceeded first in a federal court. In Allen, however, the Supreme Court found that collateral estoppel was applicable to the plaintff's claims notwithstanding the fact that the plaintiff, a former state criminal defendant, was forced to litigate his federal claim in the first instance in state court on pain of losing his right to habeas corpus relief. The Court stated,

> There is . . . no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Id. 449 U.S. at 104. We similarly conclude that any procedural disadvantages which might have accrued to Takahashi had she attempted first to litigate her §1983

claims in a federal forum are insufficient to justify an exception to the traditional doctrines of preclusion.[1]

III. California Law of Res Judicata

Under the Federal Full Faith and Credit Statute, 28 U.S.C. §1738, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra, 104 S.Ct. at 896. Accordingly, we look to California law to determine the claim-preclusive effect that the judgment entered in Takahashi's first suit has upon her present action.

Under California law, "[a] valid judg-

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[1]Takahashi relies on a contrary implication appearing in Migra, 104 S.Ct. at 898 n.7. That footnote is dictum, consisting primarily of Justice Blackmun's explanation and reconciliation of his positions in Allen, from which he dissented, and Migra, which he authored.

ment on the merits in favor of a defendant serves as a complete bar to further litigation on the same cause of action." Slater v. Blackwood, 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 226, 543 P.2d 593, 594 (1976); see 3 Witkin California Procedure Judgment §249 (1985). To determine the scope of causes of action, California courts employ the "primary right theory." Under this theory, "the violation of one primary right gives rise to a single cause of action." Slater, 15 Cal.3d at 795, 126 Cal.Rptr. at 226, 543 P.2d at 594. Because we conclude that Takahashi's present action is based on the violation of the same primary right as her earlier action, we find Takahashi's present action barred.

Takahashi's first action was based on the invasion of her contractual right to employment by the District. In that

litigation, Takahashi challenged the Commission's finding that cause existed for the termination of her contract.[2] Contractual rights are a species of primary rights. See Holmes v. David H. Bricker, Inc., 70 Cal.2d 786, 76 Cal. Rptr. 431, 452 P.2d 647 (1969) (breach of express warranty creates single cause of action); Sawyer v. First City Financial Corp., 124 Cal.App.3d 390, 177 Cal. Rptr. 398 (1981) (failure to pay note distinct violation from tortious destruction of note's value).

In the present action, the identical primary right -- the contractual right to employment -- is at stake. In

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[2]Takahashi also challenged her dismissal on the ground that the Commission's evaluation of her performance was not in compliance with the Stull Act, California Education Code §44660 et seq. To find Takahashi's present action barred, we need not rely on the primary right underlying this claim.

determining the primary right at stake, "the significant factor is the harm suffered." Argarwal v. Johnson, 25 Cal.3d 932, 955, 160 Cal.Rptr. 141, 155, 603 P.2d 58, 72 (1979). Absent termination of her employment contract, Takahashi suffered no harm. Takahashi's allegations of mental distress caused as a result of her dismissal do not present a separate injury.[3] Rather, any such distress would be a consequence of the District's violation of Takahashi's primary contractual right. Consequential damages cannot support a separate cause of action. Reichert v. General Insurance Co., 68 Cal.2d 822, 832, 69 Cal.Rptr. 321, 326, 442 P.2d 377, 382

---

[3] We do not read Takahashi's complaint as alleging any mental distress caused by the District's evaluation of her performance independent of that caused by the District's termination of her employment.

(1968); compare Argarwal v. Johnson, 25 Cal.3d at 955 (action for intentional infliction of emotional distress resulting from unlawful discharge not barred because damages under Title VII not available for mental distress).

We reject Takahashi's characterization of the primary rights invaded by the District as,

> the right to be treated in the same manner as a person of non-Japanese ancestry in the dismissal process, and . . . the right to be treated in the same manner as a person of non-Japanese ancestry and to be judged according to constitutionally adequate standards in the teacher evaluation process.

(Emphasis in original.) While stating the primary right asserted in her first action in constitutional terms, Takahashi has failed to allege a new injury. "Even where there are multiple legal theories upon which recovery might be

predicated, one injury gives rise to only one claim of relief." Slater, 15 Cal.3d at 795, 126 Cal.Rptr. at 226, 543 P.2d at 594-95. By invoking the Constitution and §1983, Takahashi has merely presented a new legal theory upon which she seeks recovery. See City of Los Angeles v. Superior Court, 85 Cal.App. 3d 143, 155, 149 Cal.Rptr. 320, 326 (1978) (section 1983 action barred where it simply asks jury to look at merits of earlier conversion action from different angle); see also Mattson v. City of Costa Mesa, 106 Cal.App.3d 441, 164 Cal.Rptr. 913 (1980) (primary right at stake in §1983 action same as in previous tort action).

IV. Adequacy of Prior Forum

Lastly, Takahashi objects to the district court's finding of res judicata on the ground that her hearing before the

Commission on Professional Competence did not allow "a full presentation of the claim[s]" she now wishes to assert in federal court. Takahashi misapplies this defense to res judicata. The procedural adequacy of her hearing before the Commission is irrelevant. The judgment that bars her present action is not the decision of the Commission, but the judgment of the Superior Court of Merced County. Because Takahashi could have raised her constitutional claims before the Commission, see California Government Code §11506(a)(5), there is no doubt that the trial court had jurisdiction to hear these claims under California Education Code §44945. In addition, the trial court was fully competent to decide the merits of any claims raised before it. Thus, Takahashi was afforded an opportunity to make a full presentation of her

constitutional claims.

The judgment of the district court dismissing Takahashi's action on the ground of res judicata is AFFIRMED.

APPENDIX B

FOURTEENTH AMENDMENT: UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

CALIFORNIA EDUCATION CODE §44944

(a) In a dismissal or suspension proceeding initiated pursuant to Section 44934, if a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a hearing. The hearing shall be initiated, conducted, and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. However, the hearing date shall be established after consultation with the employee and the governing board, or their representatives, and the Commission on Professional Competence shall have all the power granted to an agency in that chapter, except that the right of discovery of the parties shall not be limited to those matters set forth in Section 11507.6 of the Govern-

ment Code but shall include the rights and duties of any party in a civil action brought in a superior court. Notwithstanding any provision to the contrary, and except for the taking of oral depositions, no discovery shall occur later than 30 calendar days after the employee is served with a copy of the accusation pursuant to Section 11505 of the Government Code. In all cases, discovery shall be completed prior to seven calendar days before the date upon which the hearing commences. If any continuance is granted pursuant to Section 11524 of the Government Code, the time limitation for commencement of the hearing as provided in this subdivision shall be extended for a period of time equal to such continuance. However, the extension shall not include that period of time attributable to an unlawful refusal

by either party to allow the discovery provided for in this section.

If the right of discovery granted under the preceding paragraph is denied by either the employee or the governing board, all the remedies in Section 2034 of the Code of Civil Procedure shall be available to the party seeking discovery and the court of proper jurisdiction, to entertain his or her motion, shall be the superior court of the county in which the hearing will be held.

The time periods in this section and of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and of Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure shall not be applied so as to deny discovery in a hearing conducted pursuant to this section.

The superior court of the county in which the hearing will be held may, upon motion of the party seeking discovery, suspend the hearing so as to comply with the requirement of the preceding paragraph.

No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismisssal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice.

(b) The hearing provided for in this section shall be conducted by a Commission on Professional Competence. One member of the commission shall be selected by the employee, one member shall be selected by the governing board, and one member shall be an administrative law judge of the Office of Administrative Hearings who shall be chairperson and a voting member of the commission and shall be responsible for assuring that the legal rights of the parties are protected at the hearing. If either the governing board or the employee for any reason fails to select a commission member at least seven calendar days prior to the date of the hearing, the failure shall constitute a waiver of the right to selection, and the county board of education or its specific designee shall immediately make the selection. When the county

board of education is also the governing board of the school district or has by statute been granted the powers of a governing board, the selection shall be made by the Superintendent of Public Instruction, who shall be reimbursed by the school district for all costs incident to the selection.

The member selected by the governing board and the member selected by the employee shall not be related to the employee and shall not be employees of the district initiating the dismissal or suspension and shall hold a currently valid credential and have at least five years' experience within the past 10 years in the discipline of the employee.

(c) The decision of the Commission on Professional Competence shall be made by a majority vote, and the commission shall prepare a written decision containing

findings of fact, determinations of issues, and a disposition which shall be, solely:

(1) That the employee should be dismissed.

(2) That the employee should be suspended for a specific period of time without pay.

(3) That the employee should not be dismissed or suspended.

The decision of the Commission on Professional Competence that the employee should not be dismissed or suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors.

The commission shall not have the power to dispose of the charge of dismissal by imposing probation or other alternative sanctions. The imposition of

suspension pursuant to paragraph (2) shall be available only in a suspension proceeding authorized pursuant to subdivision (b) of Section 44932 or Section 44933.

The decision of the Commission on Professional Competence shall be deemed to be the final decision of the governing board.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

The governing board and the employee shall have the right to be represented by counsel.

* * *

CALIFORNIA EDUCATION CODE §44945

The decision of the Commission on Professional Competence may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction in the same manner as a decision made by a hearing officer under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.

CALIFORNIA GOVERNMENT CODE §11523

Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within 30 days after a request therefor by him, upon the payment of the fee specified in Section 69950 as now or hereinafter amended for the transcript,

the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by a hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any

other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

CERTIFICATE OF SERVICE

I hereby certify that photostatic copies of the Brief for Respondent on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the above-captioned case have been served upon those parties listed below by placing the same in the United States Mail, postage prepaid, properly addressed, this 30th day of May, 1986, to:

Clerk of the Supreme Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543
(40 copies)

Mary Louise Frampton
Frampton, Karshmer & Kesselman
925 N. Street, Suite 150
Fresno, California 93721
(one copy)

I declare under penalty of perjury that the foregoing is true and correct.

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Executed on May 30, 1986, at

Pleasanton, California.

Cecelia M. Stansbury

Cecelia M. Stansbury